complaint proceedings alleging that such filings are unjust and unreasonable. Inasmuch as the test is a specific application of the justness and reasonableness standard to particular circumstances, it patently applies in both contexts, but the Commission has never expressly stated as much.[18]

The second procedural step should be to require carriers to identify in their tariff filings any impact they would have on existing contracts and, in the event such impact exists, to state in detail the ground on which the carrier believes substantial cause exists for the change. If the purported justification is omitted or is insufficient on its face, of course, rejection is called for; but even if a justification is proffered which might arguably support the filing, suspension and investigation of the tariff filing should be effectively automatic. Only in this way can the customer's interests -- and by extension the efficacy of contracts as a market mechanism -- be fully protected.

---

[17](...continued)
available to nondominant carriers as well as AT&T, the Commission should also clarify here that the substantial cause test would apply to protect these arrangements against unilateral alteration.

[18] In apportioning the burden of proof in a complaint proceeding, the complainant should be able to make out a prima facie case by showing that the tariff filing in question materially modifies or abrogates its contract, and that the carrier has not demonstrated substantial cause for the revision. The burden of coming forward with evidence of substantial cause would then be on the carrier. It is particularly critical that the Commission make this clear in the context of maximum-streamlined filings. Otherwise, it will be near-impossible for customers to have a remedy for carrier violations.

Substantively, the substantial cause test has always been somewhat vague, and this substantive vagueness would, if uncorrected, limit the usefulness of contracts as a market mechanism, because a buyer asked to step up to a long-term deal may be discouraged from doing so unless it can be reasonably sure of the types of circumstances under which the deal may disappear or be materially changed. Merely granting the user a right to terminate the contract if it is changed or abrogated -- while obviously a necessary protection -- is nevertheless inadequate to protect the user against the loss of the benefit of its bargain and the often very large transaction costs of having entered into an individualized contract.

It should be made clear, therefore, that substantial cause will be found to exist only under truly exceptional circumstances. The ambit of the test must be defined in a way that protects carriers against truly extraordinary and unforeseeable changes in circumstance, but still recognizes that contracts cannot serve their intended function if customers cannot rely on them.

Luckily, a body of law already exists which carefully balances precisely these considerations. This is the set of doctrines known variously as "impossibility " and "frustration of purpose,"[19] "commercial impracticability," or

---

[19] *See* 18 S. Williston and W. Jaeger, *Williston on Contracts* 1 *et seq.* (3d Ed. 1978) (cited herein as "*Williston on Contracts*"); *Restatement (Second) of Contracts* §§ 261 *et seq.* (1979) (cited herein as "*Restatement*").

"failure of presupposed conditions."[20] Professor Williston's treatise sums the key ingredients up as follows:

> [T]he essence of the present defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved . . . .
>
> * * * *
>
> The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor.

18 *Williston on Contracts* at 6-8.[21] Note the key adjectives employed by Williston: the difficulty of performance must be "extreme" or "unreasonable" and the circumstance causing it must have been "unanticipated" and make performance "vitally different" from what had been contemplated. These are heavy burdens to carry -- and they should be in order to avoid divesting the contracts of the certainty which is essential to their usefulness in the marketplace. As Williston goes on to say, without such unusual circumstances:

> The fact that by supervening circumstances, performance of a promise is made more difficult and expensive, or the

---

[20] Uniform Commercial Code (UCC) § 2-615.

[21] The related doctrine of frustration of purpose applies when literal performance of the contract remains possible, but the essential reason for the contract, recognized as such by both parties at the time of contracting, has ceased to exist due to unforeseen circumstances. *See* 18 *Williston on Contracts* at 124 *et seq.*; *Restatement* at § 265.

> counterperformance of less value than the parties anticipated when the contract was made, will ordinarily not excuse the promisor.

Id. at 176.[22]

These concepts are ideal for the purpose of providing certainty for customers while relieving carriers of performance under truly unreasonable circumstances. They have evolved over many decades of experience in the commercial arena. Moreover, they are an excellent formulation of the justness and reasonableness standard in the contract context. It is just and reasonable to expect a carrier to abide by the terms of contracts into which it has freely entered at arm's length with its customers, absent the compelling reasons which are recognized as valid excuses for nonperformance in the commercial arena generally.[23] The Commission should clearly state that it is these principles that will be used in applying the substantial cause test to tariff filings which propose to abrogate or materially modify existing contracts.

---

22 *Cf. Restatement* at § 261, note b: "[M]ere market shifts or financial inability do not usually effect discharge under the [impossibility] rule stated in this section." *See also* UCC § 2-615, Official Comment 4.

23 In *AT&T Communications, Revisions to Tariff No. 2,* Transmittal Nos. 2404 and 2535, DA 90-1545, released October 31, 1990, at para. 21, the Common Carrier Bureau properly held that mere reduction in revenues from the levels expected does not constitute substantial cause. Even a loss by the carrier should not be deemed substantial cause, so long as it does not occur because of events amounting to impossibility or commercial impracticability. Unregulated companies are not released from commitments just because they prove unprofitable.

V. THE COMMISSION SHOULD CLARIFY NONDOMINANT CARRIERS' INHERENT ABILITY TO PROVIDE A PORTION OF THEIR SERVICES AS PRIVATE CARRIAGE, AND SHOULD SPECIFY CLEAR PROCEDURES FOR DOING SO.

In the *Interexchange Competition* rulemaking, the Commission sketched out in the NPRM a procedure whereunder AT&T could apply under Section 214 of the Act for Commission permission to "discontinue" a specified portion of its common carrier services so that it could free up capacity on its network for the offering of services on a private carriage basis. The Commission tentatively concluded that it had the power to permit AT&T to offer some services as private carriage, citing, among other cases, *Domestic Fixed-Satellite Transponder Sales,* 90 F.C.C.2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v. FCC,* 735 F.2d 1465 (D.C. Cir. 1984). *See Interexchange Competition,* NPRM, 5 FCC Rcd 2627, 2644-45 (1990). In its initial comments in *Interexchange Competition*, the Committee agreed that the Commission had the power to allow AT&T to engage in private carriage where consistent with the public interest, but that in order to assure that the public interest was served, the Commission must address a number of issues in implementing any such regime for AT&T. While various issues were described, all went essentially to the same bottom line: how to separate private carriage offerings from common carriage offerings definitively enough to prevent cross-subsidy of the private carriage offerings by those last few of AT&T's common carriage offerings in which AT&T arguably maintained vestigial market power. *See* Committee Comments, CC Docket No. 90-132, filed July 3, 1990, at 36-38.

The Commission has not, as yet, adopted private carriage for AT&T, although the Report and Order in CC Docket No. 90-132 does not make clear why the Commission chose not to do so at that stage. *See Interexchange Competition,* Report and Order, 6 FCC Rcd at 5897 n. 150. On the other hand, the Commission has by no means ruled out the adoption of a private carriage regime for a portion of AT&T's services, and we urge the Commission to consider doing so when the implementation problems have been mooted out by the vanishing of the last remnants of AT&T's market power.

But the Commission need not and should not wait to establish a clear mechanism for allowing nondominant carriers to offer a portion of their services as private carriage. While the Committee believes that the nondominant carriers already have the authority to do this under existing rules, it would be very beneficial to the marketplace if the Commission would provide clear confirmation that this is in fact the case.

The distinction between common and private carriage has been perhaps most lucidly adumbrated in *NARUC I.* In that case, the Court noted succinctly:

> [T]he critical point is the quasi-public character of the activity involved. To create this quasi-public character, it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently . . . ."

* * * *

> But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

NARUC I, 525 F.2d at 641, *quoting Semon v. Royal Indemnity Co.,* 279 F.2d 737, 739 (5th Cir. 1960). As the Court explicitly noted, it is not the number or type of clientele served that matters, it is the carrier's manner and terms of dealing with them. *Id.* at 642.

Patently, the same entity may deal with clients in different ways, even from transaction to transaction. It is well established, therefore, that the same entity may offer both common carriage and private carriage services. The Court of Appeals made this clear in *Wold, supra,* 735 F.2d 1465 (D.C. Cir. 1984), upholding the Commission's determination that the same entity could both offer domestic satellite transmission service on a common carrier basis and sell transponders on a private carriage basis. The Court approved the Commission's method of protecting the public interest -- carefully assuring itself that there would still be sufficient transponder capacity dedicated to common carriage to meet foreseeable demand for common carrier services. *Wold* 735 F.2d at 1474-76. The Court cited a number of instances in which the Commission had determined that the public interest would be served by side-by-side common and private carriage regimes. *Wold,* 735 F.2d at 1474 n. 21, *citing Land Mobile Radio Service,*

51 F.C.C.2d 945 (1975), *aff'd, NARUC I,* 525 F.2d 630; *Allocation of Microwave Frequencies Above 890 Mc,* 27 F.C.C. 2d 359, 411-14 (1959).[24]

Subsequent to *Wold*, in 1986, the Commission determined that transponder capacity was now plentiful enough relative to demand for common carriage transponder service that it could dispense with the necessity for case-by-case showings that a transponder sale would not jeopardize the availability of common carrier service. Instead, the Commission held: "[D]omestic satellite licensees should be routinely authorized to offer transponders on a noncommon carrier basis absent a showing that it would not be in the public interest . . . ." *Martin Marietta Communications Systems, Inc.,* 60 R.R.2d 779 at para. 11 (1986).

The climate is now ideal for the Commission to make clear that what it did for domsats it will do for other nondominant carriers: "routinely authorize[them] to offer [service] on a noncommon carrier basis absent a showing that it would not be in the public interest . . . ." The Commission has found, in CC Docket No. 90-132, that the interexchange marketplace is characterized by large amounts of excess capacity, and it is highly unlikely that nondominant facilities-based carriers would elect to place such enormous portions of their capacity into a private carriage regime as to jeopardize their common carriage

---

[24] As further support, the Court also cited *Home Ins. Co. v. Riddell,* 252 F.2d 1 (5th Cir. 1958); *Ciaccio v. New Orleans Public Belt R.R.,* 285 F. Supp. 373, 375 (E.D. La. 1968); *State v. Sinclair Pipe Line Co.,* 180 Kan. 425, 304 P.2d 930, 941 (1957); and *Utilities Comm. v. Gulf Atlantic Towing Corp.,* 251 N.C. 105, 110 S.E.2d 886, 889 (1959).

customers.[25] Thus, a presumption can safely be adopted that nondominant carriers may, consistent with the public interest, withdraw some stated percentage of their capacity from common carrier use in order to use it to provide private carriage.[26]

The Commission need not even substantively amend its rules to permit this. Existing Section 63.71 of the Commission's Rules provides streamlined procedures whereunder nondominant carriers may file, pursuant to Section 214 of the Act, for Commission authorization to discontinue, reduce or impair service, under substantially streamlined procedures. The carrier need only give notice to affected customers, who then have fifteen days to inform the Commission if they oppose the grant of authorization. The rule provides: "The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier."

The Commission should expressly state that nondominant carriers are permitted to use this avenue to discontinue or reduce common carrier service

---

25 The decisions of resellers as to whether they wish to do business on a common or private carriage basis, of course, have no impact on the level of excess capacity available, and resellers should *a fortiori* have maximum flexibility in making those decisions.

26 As in the domsat context, it would be open to petitioners to show that the withdrawal of capacity from common carriage would harm the public. But given the unfortunate predilection of both AT&T and the nondominant carriers to use the regulatory process to handicap competition, the Commission should make crystal clear that the showing must be detailed and compelling to prevent the grant of a withdrawal authorization.

for the purpose of allowing part of their capacity to be used for private carriage. Moreover, the Commission should make clear its expectation that, in many if not most, instances of applications made for this purpose, it is unlikely that there will be any affected customers to the extent that facilities-based carriers continue to provide common carrier services with much of their capacity.[27] This also means that the grounds stated in the rule for denial of the application are extremely unlikely to be met and the Commission should so state.

VI. CONCLUSION

The Commission should view this proceeding as an opportunity both to steer a steady course on forbearance and to identify other avenues for maximizing the free workings of the competitive marketplace. It should not only decline any invitation to withdraw from forbearance but should strengthen forbearance by: (a) stressing the even stronger justification for forbearance in the context of individualized transactions and resale common carriage; (b) streamlining further its regulation of nondominant carriers that are in fact filed, while protecting customers against unilateral modifications of those contracts; and (c) facilitating the offering of private carriage services by both resellers and facilities-based nondominant carriers. By taking these steps, the Commission can

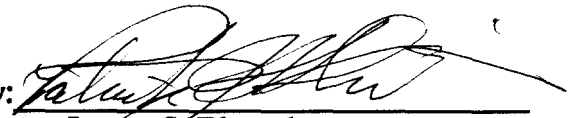
---

[27] For resellers, as noted above, service would continue to be available from underlying facilities-based carriers. The offering of private carriage by resellers therefore cannot jeopardize the availability of common carrier services, and accordingly the Commission should simply authorize all resellers on a blanket basis to elect private carrier status for some or all of their services.

not only avoid retreating, but can advance further toward an age of maximum competition in the interexchange marketplace.

Respectfully submitted

AD HOC TELECOMMUNICATIONS USERS COMMITTEE

By: 

James S. Blaszak
Patrick J. Whittle
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 East
Washington, D.C. 20005

March 30, 1992

Its Attorneys